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Before the
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Washington, D.C.

In the Matter of	)	
	)	
Distribution of	)	CONSOLIDATED DOCKET NO.
Cable Royalty Funds	)	14-CRB-0010-CD/SD
	)	(2010-2013)
In the Matter of	)	
	)	
Distribution of	)	
Satellite Royalty Funds	)	

MULTIGROUP CLAIMANTS' OPPOSITION TO SETTLING DEVOTIONAL CLAIMANTS' MOTION TO QUASH DISCOVERY REQUESTS OF MULTIGROUP CLAIMANTS

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ARGUMENT

A. THE SDC NEVER INTENDED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS, AND SUBMITTED AN UNTIMELY MOTION TO QUASH DISCOVERY.

The Judges prior scheduling order in this proceeding gives no details about the schedule for discovery, directing only that discovery commence on December 29, 2017 and conclude on March 1, 2018. See *Order Consolidating Proceedings and Reinstating Case Schedule* (Dec. 22, 2017). Nevertheless, given the time typically required to review direct statements, draft discovery, respond to discovery, produce documents in response to discovery, analyze produced documents with the assistance of expert witnesses, submit "follow-up" discovery, respond to the "follow-up" discovery and produce documents in response thereto, a very tight timeline exists. The Judges provided only two months for all the foregoing to occur, and even with cooperating parties, this timeline would be difficult to accomplish. Nonetheless, on multiple prior occasions the task has been accomplished by cooperating counsel.

As should be expected, the Judges presumed that the parties and their counsel would act professionally and cooperate in this proceeding. The Settling Devotional Claimants have not. In order to accommodate the Judges' scheduling order, and provide a schedule on which all parties could rely, Multigroup Claimants ("MC") proposed a discovery schedule to the SDC that was consistent with discovery timelines agreed to in prior proceedings. MC made the proposal *prior* to the submission of written direct statements, on December 21, 2017, and the SDC simply did not respond. See **Exhibit A**. Following the aforementioned order consolidating proceedings and moving the filing date for written direct statements from December 22, 2017 to December 29, 2017, MC revised the proposal in order to extend all the proposed dates by an additional week,

and *again* submitted the proposed discovery schedule. See **Exhibit B**. Even prior to seeing MC's written direct statement, the SDC declined to agree, and already anticipating its intent to not cooperate with discovery in this proceeding, the SDC refused to propose an alternative to MC's proactive proposal.1 Id.

As reflected in MC's discovery requests, response to the requests was due on January 15, 2018. Notwithstanding, the SDC failed to file its *Motion to Quash* until January 24, 2018, significantly beyond the response due date, and almost halfway through the defined discovery period scheduled to conclude March 1, 2018.

As the SDC is well aware:

> "The producing party does not make a judgment call regarding what evidence might be probative, persuasive, or admissible***. If the producing party has evidence that it wishes to withhold—for whatever reason—the producing party must file a motion to obtain relief from its discovery obligation, most often in the form of a motion to quash the discovery request in general or in some particular.*** Determination of what evidence is admissible and what evidence is probative, and a decision on what weight the evidence might have, is solidly in the purview of the triers of fact. Further, whether a receiving party is prejudiced by a failure to produce discovery is irrelevant to the issue of a party's duty to produce discovery."

Docket no. 2012-6 CRB CD 2004-2009 (Phase II), Docket no. 2012-7 CRB SD 1999-2009 (Phase II), *Order on IPG Motions for Modification* (April 9, 2015) (emphasis added).

The foregoing text reflects the very basis on which the Judges not only refused to recognize objections asserted by IPG in good faith, but *sanctioned* IPG for not affirmatively

1 The basis provided by the SDC to refusing to agree to a discovery schedule was its ostensible need to first see MC's written direct statement. Nonetheless, in all prior proceedings, discovery schedules were proposed and agreed upon between the parties *prior* to the filing of written direct statements. That is, the SDC never previously insisted that a discovery schedule was predicated on first seeing an adversary party's written direct statement.

moving that the discovery requests of which IPG took issue be stricken or modified. Id. Here, the SDC has effectively failed to file a motion to quash by untimely filing its *Motion to Quash*, pushing briefing and resolution well into the defined discovery period. Even if MC were to immediately receive the SDC production, its review will be unnecessarily rushed and prejudiced.

Comparable treatment in this instance requires not only that the SDC's objections to MC's discovery requests be disregarded, but that an equally formidable sanction issue against the SDC for its bad faith refusal to participate in discovery, i.e., the striking of multiple claims. As precedent reflects, the discovery sanction issued against IPG that was the basis of the ruling above lessened IPG's claim in the devotional programming category from an average of 30.5% of eleven satellite royalty pools to 2% of such pools, and an average of 25.15% of six cable royalty pools to 10.2% of such pools, *according to IPG's adversary* the SDC.2 Under the methodologies presented by IPG, the consequence was even more significant.

What is before the Judges, therefore, is a circumstance in which the SDC has filed a motion to quash based on an argument that is not only logically indefensible, but is without legal precedent ***and*** runs contrary to what has occurred in prior proceedings in which the SDC was a firsthand participant. In order to push its indefensible argument along, the SDC has misrepresented the law to the Judges, and mischaracterized MC's ability to engage in the rebuttal phase of the proceedings as "a presentation of a methodology of Multigroup Claimants' own

2 *Cf.* SDC Written Direct Statement, Test. of J. Sanders (filed July 8, 2014) (avg. satellite royalty of 30.5%) and SDC Written Direct Statement, Test. of J. Sanders (filed July 8, 2014) (avg. cable royalty of 25.15%) *with* SDC Written Direct Statement (remand proceedings), Testimony of John Sanders at p. 16 (filed August 22, 2016) (avg. cable royalty of 10.2%, avg. satellite royalty of 2%).

making". Taken in the context of the SDC's clearly reflected intent to not engage in discovery *at all*, the SDC's motion to quash is revealed for exactly what it is – a bad faith refusal to partake in these proceedings.

B. THE SDC'S MOTION TO QUASH MULTIGROUP CLAIMANTS' DISCOVERY RESTS PRIMARILY ON THE JUDGES' RULING ON THE "JOINT MOTION TO STRIKE MULTIGROUP CLAIMANTS' WRITTEN DIRECT STATEMENT". THE SDC PURPOSELY MISCITES CRB REGULATIONS, AND THE SDC HAS ENGAGED IN SUBSTANTIALLY SIMILAR ACTS, WITH NO CONSEQUENCE TO THE CLAIMS OF THE SDC, NO CONSEQUENCE TO A SDC'S ENGAGEMENT IN DISCOVERY OR REBUTTAL, AND THE SDC MISREPRESENTED SUCH FACTS TO THE JUDGES.

The SDC previously moved to strike MC's Written Direct Statement in the above proceedings, and dismiss all MC-represented claims for 2010-2013. As is immediately apparent, the primary basis of the SDC's *Motion to Quash Discovery of Multigroup Claimants* rests on the outcome of that previously-submitted motion.

No different than the MPAA motion to quash filed a week prior to the SDC motion, the SDC believe that the Judges are not sufficiently astute to recognize the SDC's gross mischaracterization of MC's written direct statement. That insulting fact is the only reasonable explanation for the SDC's repeated statement that MC "did not file" a written direct statement. For risk of being repetitive of the arguments set forth in MC's *Opposition to Motion to Strike the Written Direct Statement of Multigroup Claimants*, MC ***has*** filed a written direct statement in the distribution phase, ***has*** included all of the required elements, and ***has*** identified the distribution methodologies to which it will accept.

Nonetheless, the SDC add one novel argument. While "incorporating by reference" the arguments set forth in the jointly submitted *Motion to Strike*, the SDC add that MC's written

direct statement "admits" that MC did not believe that its provisional claim to 100% of the devotional programming fund "was likely to have evidentiary support", an ostensible violation of "37 C.F.R. § 350.6(e)(3)". According to the SDC, this requires the Judges to altogether disregard MC's percentage claim, and create the fiction that MC's written direct statement contained no percentage claim, which is a requirement under 37 C.F.R. § 351.4(b). *Ergo*, according to the SDC, MC "did not file" a written direct statement.

The only "admission" to be made by Multigroup Claimants and its counsel is the frustration of having to repeatedly deal with the bad faith arguments, misrepresentations, omissions, and hypocritical positions taken by the SDC and its counsel, which recently warranted the filing of a *Motion for Admonition* against the SDC and its counsel in the 2000-2003 cable proceedings (Phase II remand). First, there is no "37 C.F.R. § 350.6(e)(3)" in the CRB regulations, and the SDC's misdirection to a non-existent provision gives pause to consider whether such cite was for the ulterior motive of avoiding scrutiny of the provision that *should* have been cited by the SDC. Section 350.6(e)(1)(iii) of the regulations states, in part, that:

> "The signature of an attorney [on a pleading] constitutes certification that the contents of the document are true and correct, to the best of the signer's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances and:
>
> * * *
>
> (iii) The allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support ***after a reasonable opportunity for further investigation or discovery***. . . ."

37 C.F.R. § 350.6(e)(1)(iii) (emphasis added).

But again, the SDC and its counsel omit a highly relevant portion of a cited provision. But again, the SDC and its counsel make their argument only after misrepresenting MC's position. As was made clear in MC's written direct statement, MC had agreed to "***accept the results of methodologies submitted by adverse parties in these proceedings***", and:

> "***Pending review of the distribution methodologies advocated by other parties to these distribution proceedings, Multigroup Claimants makes claim to one-hundred percent (100%) of the royalties*** attributable to the devotional and program supplier categories, comparable to the claims for one-hundred percent of such royalties previously claimed by the Settling Devotional Claimants and the Motion Picture Association of America. Upon review and examination of any distribution methodologies submitted to the Judges, Multigroup Claimants reserves its right to revise its percentage claim according to 37 C.F.R. § 351.4(b)(3)."

Multigroup Claimants' *Written Direct Statement* (Dec. 29, 2017), *Test. of R. Galaz* at 3-4 (emphasis added).

Taken in context, no reasonable allegation can be made that MC or its counsel made a claim in a pleading that was *not likely to have evidentiary support after a reasonable opportunity for further investigation or discovery***,** because the statement to which the SDC takes issue (the "100%" percentage claim) is specifically *subject to* the review of supporting evidence after a reasonable opportunity for further investigation or discovery.

In fact, because of the dilatory effort of the SDC, which has now taken the parties halfway through the discovery phase of these proceedings without an iota of substantiating documentation being produced by the SDC, *no one knows* what results would be rendered by application of the SDC (or MPAA) methodologies. Unless and until MC is allowed to review the data underlying

the SDC and MPAA methodologies, MC's percentage claim to 100% of the devotional programming category stands.3

While the SDC argue that *all* discovery should be quashed because of the alleged deficiency of MC's written direct statement, it should be noted that Multigroup Claimants has come across additional evidence relevant to the SDC's position. When Multigroup Claimants responded to the *Joint Motion to Strike Written Direct Statement of Multigroup Claimants*, filed by the MPAA and the SDC, Multigroup Claimants was able to identify at least one proceeding in which the SDC presented no distribution methodology. Entering into the final distribution hearings in the 2000-2003 cable proceedings (Phase II), the SDC maintained that it was entitled "100%" of the devotional programming fund, despite the SDC not submitting *any* proposed distribution methodology, despite reviewing documents produced in discovery by IPG, and despite having failed in its challenge to the viability of claims of IPG-represented claimants. Notwithstanding, such fact did not affect the claims of the SDC under a competing party's methodology (IPG's), the SDC's ability to engage in discovery, or the SDC's entitlement to engage in rebuttal directed toward IPG's proposed methodology.4 Inexplicably, in a recent filing the MPAA argue that such situation is distinguishable because there are no pending claims challenges in this proceeding, ignoring the evident fact that the SDC's claim for "100%" of the

3 The SDC further contended that MC's written direct statement was deficient because it did not present a "uniquely constructed" distribution methodology that was constructed by MC. See infra. As is clear from all statutes and regulations pertaining to the filing of written direct statements, no obligation exists to submit to *any* particular distribution methodology as part of any written direct statement, yet MC nonetheless did so. See 37 C.F.R. § 351.4(b).

4 See *Multigroup Claimants' Opposition the Joint Motion to Strike Written Direct Statement of Multigroup Claimants* (Jan. 17, 2018), *citing* 2000-2003 cable proceeding (Phase II).

devotional programming royalties continued even after the SDC's claims challenges had failed.5 That is, there were no pending claims challenges in *that* proceeding when the SDC made claim for 100% of the royalties.

More analogous, however, Multigroup Claimants has identified yet *another* proceeding in which the SDC submitted no methodology yet remained a participant in the proceedings. Different from the 2000-2003 cable proceeding (Phase II) referenced above, however the SDC affirmatively conceded to application of another party's methodology – ***exactly as Multigroup Claimants has done in this proceeding***. See *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063, 57075 (Sept. 17, 2010). In fact, the SDC affirmatively *advocated* another party's methodology. Id.

Specifically, in the 2004-2005 cable proceeding (Phase I), the SDC advocated application of the JSC-sponsored Bortz survey, presenting no methodology of its own. In fact, the *only* testimony offered by the SDC was by witness Dr. William Brown, whose testimony was for the purpose of rationalizing the increase of devotional programming share under the JSC-presented Bortz survey since the 1990-1992 proceeding.6 Id. As reflected by the decision, the Judges found Dr. Brown's testimony to unsubstantiated opinion, totally lacking in any value.7

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5 See *MPAA Reply in Support of Motion to Quash Multigroup Claimants Discovery Requests* at 6 (Feb. 5, 2018).

6 In a recent filing, the MPAA charitably characterize Mr. Brown's testimony as a "qualitative" analysis. See *MPAA Reply in Support of Motion to Quash Multigroup Claimants Discovery Requests* at 6 (Feb. 5, 2018). It was, by contrast, little more than subjective opinion that the SDC's share should be increased from a prior award – *under the Bortz survey*. See generally, *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063, 57075 (Sept. 17, 2010) ("Devotional Claimants have consistently supported the JSC's cable operator valuations of

The existence of this example is poignant for several facts. First, the 2004-2005 cable decision makes abundantly clear that the SDC remained as a participant in the proceeding, engaged in discovery, engaged in the rebuttal process, and was awarded a share based on its claims – despite proffering no distribution methodology of its own. Second is the fact that both the SDC and the MPAA took part in such proceeding, including certain counsel of record for both parties in *this* proceeding. Consequently, the SDC and MPAA have sought to distort the precedent applicable to these proceedings despite firsthand knowledge that a party's advocacy of another party's methodology, without presentation of its own uniquely constructed methodology, has no consequence on the viability of claims, no consequence on the ability of such party to engage in discovery, and no consequence to a party's ability to engage in rebuttal of other party's methodologies. At a certain point, the Judges must accept that such is not mere advocacy, but a fraud on the Court, one that should not be taken lightly.8

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the program categories throughout the history of their participation in these distribution proceedings. . . .").

7 See *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063, 57073-57075 (Sept. 17, 2010) ("The testimony offered [by Dr. William Brown on behalf of the SDC] regarding growth of devotional programming and avidity and loyalty of devotional viewers was anecdotal in nature and comprised largely of unsupported opinion.").

8 In fact, the SDC and MPAA previously made the *same* false representation in this very proceeding, asserting that they were unaware "in four decades" of an instance in which a party was able to participate in discovery and a proceeding without submitting its own distribution methodology. Multigroup Claimants directed the Judges to the fact that fewer than six months prior to the filing of this brief, in the 2000-2003 cable proceeding (Phase II), exactly such situation had occurred. See *Multigroup Claimants Opposition to Joint Motion to Quash Discovery Requests of Multigroup Claimants* at 3 (filed August 1, 2017). Nevertheless, the SDC (and MPAA) persist with their false representation that such has never occurred, though both are expressly aware of the contrary.

In any event, although Multigroup Claimants would never advocate doing so, nothing prohibits a party from asserting a claimed percentage or dollar amount to a fund, then asserting that it is based on nothing more than the unsubstantiated opinion of a sponsoring witness. As noted in the example above, the SDC did *exactly* this in the 2004-2005 cable proceedings (Phase I) and, predictably, the results of such SDC "methodology" was found totally lacking in merit. Id. Nonetheless, such meritless methodology did not result in the dismissal of all SDC claims.9 Rather, it simply resulted in the Judges' adoption of an adversary's methodology.

Even ignoring (i) the SDC's knowing misrepresentation of the CRB regulations, and (ii) the SDC's knowing misrepresentation of precedent by ignoring no fewer than two proceedings in which the SDC has engaged in the *identical acts* of which the SDC now contends all Multigroup Claimant claims should be dismissed, an extraordinarily offensive aspect of the SDC motion is the SDC's repeated claim that Multigroup Claimants' exercise of its right to engage in the rebuttal phase of proceedings equates to Multigroup Claimants' presentation of its own uniquely constructed methodology:

> "MGC apparently would like to present his own variation on the methodologies propounded by the other parties, disguised as "adjustments" and developed with the benefit of reviewing all of the evidence and testimony already put forth by the other parties. MGC's proposed sequencing of events would also allow MGC to avoid rebuttal testimony to be presented against his "adjusted" methodology, and avoid fullscale discovery into his methodology and case."

SDC motion at 3.

9 *Ergo*, in *Multigroup Claimants' Opposition to Motion to Strike the Written Direct Statement of Multigroup Claimants*, Multigroup Claimants observed that the moving parties would contend that even an outrageously dimwitted methodology would satisfy the requirements of a written direct statement, whereas acceding to a competing methodology would not.

Literally nowhere has Multigroup Claimants signaled an intent to "present its own variation on the methodologies propounded by the other parties." In fact, because the Judges have already made clear that they could select application of a distribution methodology that was presented as part of a *different* program category,[10] the discovery and "rebuttal" phase of these proceedings would inherently include Multigroup Claimants' receipt of the MPAA data for the program suppliers category, and application of such data and methodology to the devotional programming category, in order to consider the results, or vice-versa.

Still, despite this rather obvious application that was foretold by Multigroup Claimants *in its written direct statement*,[11] the SDC argue that under the guise of "adjustments" Multigroup Claimants seeks to present its own uniquely constructed distribution methodology. As noted, Multigroup Claimants has not indicated any such intent, and *if* a day were to ever arrive when Multigroup Claimants did attempt to skirt the process for presentation of its own distribution methodology, *then* the Judges could dismiss such attempt at such time the same way they

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10 See Docket nos. 2012-6 CRB CD 2004-2009 (Phase II), 2012-7 CRB SD 1999-2009 (Phase II), *Amended Joint Order on Discovery Motions* (July 30, 2014), at p. 8:

> "The issue is not whether the Judges are "required" to apply a particular valuation methodology or whether a party can "insist" upon the application of a certain methodology. Rather, the statute directs the Judges to determine the distribution of royalties. See 17 U.S.C. §§ 111(d)(4), 119(b)(5). The Judges do so pursuant to a standard of "relative marketplace value." [citations omitted]. The Judges may utilize any party's methodology that they conclude best satisfies this standard, or any methodology that applies elements of the parties' various proposals and other factors that the Judges, in their discretion, may properly apply. Thus, it would be unlikely that the Judges would conclude, on the one hand, that a particular methodology presented in a particular category in a Phase II proceeding best satisfies the standard, but, on the other hand, refuse to apply that optimal methodology in a different Phase II category."

11 See *Multigroup Claimants Written Direct Statement*, Test. of Raul Galaz at 4.

dismissed the SDC's attempted "trial by ambush" in the 2000-2003 cable proceedings. To date, however, this has not occurred, nor has Multigroup Claimants articulated any desire to present its own uniquely constructed distribution methodology.

C. THE SDC FALSELY EQUATE AGREEMENT TO A DISTRIBUTION METHODOLOGY TO CONCESSION THAT SUCH METHODOLOGY HAS BEEN ACCURATELY APPLIED. MULTIGROUP CLAIMANTS CANNOT CONFIRM THE RESULTS OF THE SDC METHODOLOGY WITHOUT PRODUCTION OF SUPPORTING DOCUMENTS, NOR OPINE WHICH OF THE ASSERTED METHODOLOGIES IS SUPERIOR.

In an attempt to foreclose *any* review of a broad swath of its supporting data, even to verify whether the SDC has accurately applied its own distribution methodology, the SDC put forth a sophomoric argument that acceptance of a stated methodology requires Multigroup Claimants to blindly accept the SDC's stated results of such methodology, regardless of what errors of application might exist.12 No authority exists for such a ruling, nor does common sense dictate limiting discovery to preclude verification that a party has accurately applied its own asserted methodology.

Multigroup Claimants was aptly aware of the methodologies that the SDC and MPAA intended to present in this proceeding, and no surprises presented themselves in connection

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12 In recent correspondence amongst the parties, SDC counsel absurdly stated "how can you rebut a methodology that you have accepted". The obvious response is two-part. First, accepting a party's stated methodology is not the same as accepting the results that a party indicates were derived from such methodology. Second, at no point did Multigroup Claimants unqualifiedly accept the results of the SDC methodology. Rather, Multigroup Claimants acceded to the methodologies submitted by the SDC and the MPAA, without designating which it would support, and expressly stating that such accession was subject to confirmation of the data underlying such asserted methodologies. As such, SDC counsel's contention that Multigroup Claimants had unqualifiedly accepted the SDC methodology is simply fabrication.

therewith. As should be obvious, however, even accepting another party's stated distribution methodology does not foreclose the possibility that the party has inaccurately applied its own stated methodology, or made a calculation or logic error that can be remedied. This fact is currently playing out in the 2010-2013 cable proceedings (allocation phase), wherein the MPAA expert witness (Dr. Gray) discovered an omission of WGNA data that significantly affected his presented results. Put in context, while a party could agree in principle to the methodology presented by Dr. Gray, one would not agree with Dr. Gray's stated results if Dr. Gray had erringly and unintentionally omitted a station of such extraordinary significance as WGNA.

Moreover, the SDC's argument ignores that the SDC's methodology *could* be applied to the distribution of royalties between Multigroup Claimants and the MPAA in the program suppliers category, and the MPAA's methodology *could* be applied to the distribution of royalties between Multigroup Claimants and the SDC in the devotional category. That is, Multigroup Claimants' accession to either distribution methodology does not mean that Multigroup Claimants has affirmatively elected either methodology for application to either programming category. Consequently, which of the two methodologies appears superior for application to the devotional programming category remains unclear, and can only be clarified after production of data underlying those methodologies.

Despite these rather obvious facts, the SDC seek to preclude its obligation to respond to thirty-seven (37) document requests going toward the data that the SDC must produce in order to *merely* substantiate application of its methodology.13 As the Judges are likely aware,

13 The irony, of course, is the discomfort that the SDC finds with actually having to substantiate its results. Most parties would desire the opposite, i.e., to demonstrate how

"adjustments" to methodologies have been commonplace in the distribution proceedings, with the CRB and its predecessors adjusting percentage awards upwards or downwards based on identified errors in calculation or logic.14 Precluding discovery to avoid any challenge that an "adjustment" must be made simply denies this historical fact.

In the end, the SDC's objection is revealed for its true nature, a concern that its results are misstated and/or inferior to the methodology submitted by the MPAA, and its attempt to hide such revelation by avoiding any opportunity for any party to scrutinize such data.

D. THE SDC IS OBLIGATED TO PRODUCE ITS ALLOCATION PHASE DISCOVERY MATERIALS.

The SDC choose to re-litigate an issue already addressed in this proceeding, in order to deny Multigroup Claimants access to documents and information developed by the SDC and/or received by the SDC from any party, in connection with the allocation phase of these proceedings.

On August 11, 2017, the Judges issued an order denying Multigroup Claimants' ability to received allocation phase materials *at that particular point in time*. Nonetheless, the Judges stated:

> "CRB rules, and the Judges' scheduling order in this proceeding, permit the parties to propound discovery requests following the filing of WDSs (MGC has, in fact, already done so). To the extent any materials exchanged during allocation phase discovery are responsive to MGC's post-WDS-D discovery requests for "nonprivileged underlying documents related to" the other parties' *WDS-D*s, ***MGC will receive those materials in due course***. 37 C.F.R. § 351.6. MGC would then be permitted to amend its WDS to account for any "new material received

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accurately its asserted methodology has been reflected by its stated results. Not the SDC, whose anxiety about such matter seeks to avoid any review that might demonstrate error on its part.

14 See, e.g., *Distribution of the 2004 and 2005 Cable Royalty Funds*, 75 Fed. Reg. 57063 (Sept. 17, 2010).

> during the discovery process"—***including any material that may have been exchanged among other parties during allocation phase discovery***. 37 C.F.R. § 351.4(c)."

Order Granting in Part Multigroup Claimants Expedited Motion to Continue Distribution Proceedings Following Resolution of Pending Motions at 4 (Aug. 11, 2017).

Indeed, as is clear from the CRB regulations, in order to introduce into evidence any study or analyses, a party is obligated to identify any "alternative courses of action considered". Consequently, any information *known* to be in the possession of a party prior to construction of their study design is appropriate subject matter for discovery.

> (e) *Introduction of studies and analyses.* If studies or analyses are offered in evidence, they shall state clearly the study plan, the principles and methods underlying the study, all relevant assumptions, all variables considered in the analysis, the techniques of data collection, the techniques of estimation and testing, and the results of the study's actual estimates and tests presented in a format commonly accepted within the relevant field of expertise implicated by the study. The facts and judgments upon which conclusions are based shall be stated clearly, ***together with any alternative courses of action considered***. Summarized descriptions of input data, tabulations of input data and the input data themselves shall be retained.

37 C.F.R. § 351.10(e) (emphasis added).

Moreover, a comparison between the information relied on by a party's expert witness in the design of their methodology with the relevant information that is in the party's hands, is made relevant by the Judges' prior rulings as to what influence a party has hand on their expert witness' construction of a methodology. In the 1998-1999 cable proceeding (Phase II), the Judges held that Independent Producers Group ("IPG") had "straitjacketed" its witness Laura

Robinson by not providing her extensive data produced by Nielsen Media Research.15 In that instance, IPG did not have the Nielsen data. In this instance, the SDC is being asked to produce data that is *known* to be in its possession, including the *identical* type of Nielsen data for which the Judges found IPG to have "straitjacketed" its witness by not providing. As made clear by the Judges' ruling, what is relevant is not merely the information that a party relied on, but the information that was in that party's possession that they had the opportunity to rely on. Quite simply, there is no basis for distinguishing the information the SDC seeks to avoid producing, and because the SDC is *known* to possess the information, the argument for requiring production is even more compelling.

Moreover, a basis of comparison to prior discovery orders is appropriate. Section 351.6 of the CRB regulations states that "parties may request of an opposing party nonprivileged underlying documents related to the written exhibits and testimony". Such provision is the basis for any discovery request. In the course of distribution proceedings, Multigroup Claimants' predecessor (IPG) has been required to produce "employment agreements" between their represented claimants and their employees, and been sanctioned for not producing a ten-year old email already in the possession of the requesting party and already twice introduced into evidence before the Judges that, according to the Judges, reflected an "attempted termination" of IPG's engagement (as opposed to an "actual termination" of engagement). None of those documents were considered by IPG-sponsored witnesses, as they had no legal effect on either the claimants' right to make claim, or IPG's engagement. Notwithstanding, *all* were deemed required to be

15 *Distribution of 1998 and 1999 Cable Royalty Funds*, 80 Fed. Reg. 13423, at 13440 (March 13, 2015).

produced as being "underlying documents *related to* written exhibits and testimony" of IPG. Given the breadth of such interpretation by the Judges, Section 351.6 surely encompasses data *directly related* to the subject matter of the SDC's asserted methodology, that is *known* to be in the possession of the SDC, that was already produced to the SDC *in this very proceeding*. To deny such fact would be arbitrary.

E. THE SDC REFUSE TO PRODUCE ANY DOCUMENTS UNDERLYING DESIGNATED TESTIMONY, CITING NO LEGAL BASIS THEREFOR.

As noted in its motion, the SDC has refused to produce any documents underlying the designated testimony of Toby Berlin. The only asserted basis for such refusal – Ms. Berlin's testimony is "designated".

No legal authority is cited by the SDC for this objection and, apparently, the SDC are under the misimpression that because testimony is "designated", it is immune from challenge. Such is not the case, nor even rational. The SDC summarily argue that "a requirement to produce documents underlying testimony designated from a prior proceeding would be unwieldy", but there is literally no showing that this would be the case for Ms. Berlin, nor does it make sense that the SDC would not have available the supporting documents.

In fact, the SDC argue that because such documents could have been subject to discovery in a prior proceeding by the parties to such proceeding, they are no longer subject to discovery in the immediate proceeding. As the Judges are aware, designated testimony is not limited to submission adverse to a party that was previously a party where the designated testimony occurred. Consequently, according to the SDC, even if the designated testimony occurred in a proceeding to which the requesting party was not involved, the requesting party would be

foreclosed from challenging any of the assumptions or conclusions of the designated testimony witness. No authority or logic warrants granting such "free pass" to designated testimony.

As often occurs, information is revealed about witnesses that is not immediately apparent, nor necessarily revealed in prior proceedings. For example, as a result of the Judges' questioning of an SDC witness in the consolidated 2004-2009 cable/1999-2009 satellite proceeding, it was revealed that such witness (Mr. John Sanders) had not *on a single occasion during his career* been involved in the valuation of retransmitted programming, the subject for which he was engaged to opine. Nor had Mr. Sanders reviewed any testimony by witnesses whose entire decades-long careers were in the cable industry, and whose opinions on the identical matters were perfectly contrary. According to the SDC, discovery concerning these relevant facts, revealed in the course of hearings and long after the conclusion of discovery in the prior proceeding, would not capable of discovery for no other reason than that the witness' prior testimony is "designated".

The gist of the SDC argument is that a collateral attack on the credibility (or conclusions) of a designated testimony witness would be "unworkable". SDC motion at 6. On the contrary, if a party desires the ease of not having to produce a witness, and the benefits of not having to subject that witness to cross-examination, such benefit is not absolute. That is, it does not insulate such designated testimony from scrutiny or challenge. Common sense renders such conclusion, and no legal authority in the CRB regulations allowing the designation of testimony from a prior proceeding would suggest otherwise.

F. THE SDC REFUSE TO PRODUCE ANY DOCUMENTS RELATING TO PRIOR ANALYSES BY THE SDC.

As noted, previously, CRB regulations expressly provide that in order to introduce into evidence any study or analyses, a party is obligated to identify any "alternative courses of action considered". See Section C, supra, citing 37 C.F.R. § 351.10(e). Multigroup Claimants has therefor sought to inquire regarding any modifications to the SDC methodology and results from prior incarnations thereof, all of which is freely discoverable as "alternative courses of action" considered by the SDC. Regardless of whether the SDC constructed an alternative course of action and memorialized it in a withdrawn written direct statement, such alternative course of action existed, and is therefor fodder for discovery.

Interestingly, the SDC immediately recognized the contradiction between its objection to Multigroup Claimants' discovery request in this proceeding, and the SDC's discovery request from IPG in the consolidated 2004-2009 cable/1999-2009 satellite proceedings. The SDC's attempt to distinguish the situations is ostensibly based on the "multiple unexplained substantial changes in the proposed awards and the computations underlying [the IPG expert's testimony]", yet such documents would have been discoverable *regardless* of whether there were "unexplained substantial changes", as the SDC allege. In fact, IPG did not object to such production, and freely produced such documents, as is required.

If the SDC seek to introduce into evidence its study or analysis, it must reveal all "alternative courses of action" considered. On what basis documents underlying such alternatives would not be discoverable is unstated by the SDC for the obvious reason that no legal or rational basis exists for the wholesale exclusion of such information from discovery.

G. THE SDC SEEK TO AVOID RESPONSE TO BOILERPLATE UNOBJECTIONABLE DISCOVERY REQUESTS.

As its final challenge, the SDC seek to prohibit its obligation to respond to Multigroup Claimants' discovery requests numbers 6 and 28, characterizing them as hopelessly vague. Allegedly, the requests fail to "[address] the SDC to any meaningful or identifiable limitation, topic, or set of documents."

Unlike its prior challenges, the SDC conveniently fail to recite the challenged requests, which are as follows:

> 6) Any and all documents relied on by John Sanders in order to form the statements and opinions expressed in his testimony, including but not limited to documents that would tend to undermine, deny, dispute, limit, or qualify any of the statements and opinions expressed in his testimony.
>
> 28) Any and all documents relied on by Erkan Erdem in order to form the statements and opinions expressed in his testimony, including but not limited to documents that would tend to undermine, deny, dispute, limit, or qualify any of the statements and opinions expressed in his testimony.

As should be immediately apparent, the discovery requests are sufficiently limited to the SDC witnesses' testimony *in this proceeding*, and request all documents relied on by the witness. Moreover, such requests are *verbatim* the form of requests posed by the SDC in prior proceedings. Certainly, the SDC's witnesses are aware of what documents they relied on in order to form their testimony, and are aware of what documents undermine their testimony. Consequently, the SDC's challenge was based on nothing more than an attempt to mischaracterize the discovery requests as hopelessly vague, and hope that the Judges did not actually review the discovery requests appearing as an exhibit to the SDC motion, all in order to avoid production of documents that undermine the witness testimony.

Such discovery requests are boilerplate, unobjectionable, and reasonably limited. No basis exists for quashing such requests.

CONCLUSION

Multigroup Claimants timely propounded discovery requiring response from the SDC no later than January 15, 2018. SDC motion, Exhibit A. Notwithstanding, the SDC did not file its pending *Motion to Quash* until January 24, 2018. At this point, the parties are more than halfway through the defined discovery period, which is scheduled to conclude on March 1, 2018. The SDC's strategic dilatory tactic, made by misrepresenting the law and processes that this panel of Judges has previously required be followed, will unduly prejudice Multigroup Claimants far more than any act for which IPG has previously been sanctioned. The SDC is well aware of this fact, well aware of the consequences for refusing to engage in discovery, and the only proper remedy is to impose a discovery sanction on the SDC on par with that previously imposed on Multigroup Claimants' predecessor, IPG.

For the foregoing reasons, the SDC's motion to quash should be forthwith quashed, the SDC should be ordered to immediately produce all responsive documents, and an appropriate discovery sanction issued upon the SDC.

Respectfully submitted,

February 7, 2018

_____/s/_____

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CERTIFICATE OF SERVICE

I hereby certify that on this 7th of February, 2018, a copy of the foregoing was sent by electronic mail to the parties listed on the attached Service List.

_____/s/_____
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Certificate of Service

I hereby certify that on Wednesday, February 07, 2018 I provided a true and correct copy of the MULTIGROUP CLAIMANTS' OPPOSITION TO SETTLING DEVOTIONAL CLAIMANTS' MOTION TO QUASH DISCOVERY REQUESTS OF MULTIGROUP CLAIMANTS to the following:

Settling Devotional Claimants (SDC), represented by Jessica T Nyman served via Electronic Service at jessica.nyman@pillsburylaw.com

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National Public Radio (NPR), represented by Gregory A Lewis served via Electronic Service at glewis@npr.org

Major League Soccer, LLC, represented by Edward S. Hammerman served via Electronic Service at ted@copyrightroyalties.com

Public Broadcasting Service (PBS) and Public Television Claimants (PTC), represented by Lindsey L. Tonsager served via Electronic Service at ltonsager@cov.com

SESAC, Inc., represented by Christos P Badavas served via Electronic Service at cbadavas@sesac.com

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American Society of Composers, Authors and Publishers (ASCAP), represented by Sam Mosenkis served via Electronic Service at smosenkis@ascap.com

Signed: /s/ Brian D Boydston